June 2004

MJI Publication Updates

Child Protective Proceedings Benchbook (Revised Edition)

Crime Victim Rights Manual

Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Domestic Violence Benchbook (3rd ed)

Juvenile Justice Benchbook (Revised Edition)

Juvenile Traffic Benchbook

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Vol. 2

June 2004

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Child Protective Proceedings

D. Statements of Existing Mental, Emotional, or Physical Condition

Insert the following case summary on page 264, immediately before subsection (E):

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at ___.

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Child Protective Proceedings

I. Residual Exceptions to the "Hearsay Rule"

Insert the following case summary on page 275 before the summary of *People v Lee*, 243 Mich App 163 (2000):

- *People v Geno,* ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant's girlfriend's two-year-old daughter. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child's pull-up. The interviewer asked the child if she "had an owie," and the child answered, "yes, Dale [defendant] hurts me here" and pointed to her vaginal area. The defendant argued that the child's statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child's statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt,* 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant's right to confrontation was violated by the admission of the victim's statements. The Court of Appeals stated:

> "We recognize that with respect to 'testimonial evidence,' *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness's statement – despite the defendant's inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a 'firmly rooted hearsay exception' or it bears 'particularized guarantees of trustworthiness.' *Roberts, supra* at 66. However, we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .
>
> "Therefore, we conclude, at least with respect to nontestimonial evidence such as the child's statement in this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining

admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim."

June 2004

Update: Crime Victim Rights Manual

CHAPTER 4

Protection From Revictimization

4.6 Limitations on Bond Pending Sentencing or Appeal for "Assaultive Crimes"

Replace the second paragraph on page 61 with the following:

If the defendant has been convicted of an "assaultive crime," he or she shall not be permitted to post bond pending sentencing or appeal unless the trial court finds by clear and convincing evidence that defendant is not likely to pose a danger to other persons, including the victim, and that defendant was not convicted of sexual assault of a minor. MCL 770.9a(1)–(2).

Effective June 30, 2004,* if a defendant is convicted of sexual assault of a minor and is awaiting sentence or has filed an appeal following sentencing, the court must detain the defendant and deny him or her bail. MCL 770.9b(1)–(2). A minor refers to an individual who is less than 16 years of age. MCL 770.9b(3)(a). "Sexual assault of a minor" means a violation of any of the following involving an individual who is less than 16 years of age:

*2004 PA 32.

- First-degree criminal sexual conduct, MCL 750.520b. MCL 770.9b(3)(b)(*i*).
- Second-degree criminal sexual conduct, MCL 750.520c. MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving force or coercion used to accomplish penetration, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(*i*).

- Third-degree criminal sexual conduct involving penetration of a victim who is related to the defendant by blood or affinity to the third degree, MCL 750.520d(1)(d). MCL 770.9b(3)(b)(*i*).

- Third-degree criminal sexual conduct involving a victim who is between the ages of 16 and 18 and a student at a public or nonpublic school and the defendant is a teacher, substitute teacher, or administrator of that public or nonpublic school, MCL 750.520d(1)(e). MCL 770.9b(3)(b)(*i*).

  Note: MCL 770.9b(3)(b)(*i*) contradicts itself. In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, "sexual assault of a minor" requires that the victim be less than 16 years of age.

- Third-degree criminal sexual conduct involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(*ii*).

- Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9b(3)(b)(*iii*).

CHAPTER 7

Victim Notification

7.15 Notification of Communicable Disease Test or Examination Results

Replace the paragraph preceding the bulleted list on page 133 with the following language:

If a criminal defendant is bound over to the Criminal Division of Circuit Court for any of several enumerated offenses, and if the district court determines there is reason to believe that the violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must order the defendant to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection* and for the presence of HIV or an antibody to HIV. MCL 333.5129(3).

*Effective May 13, 2004, 2004 PA 98 added hepatitis C infection to the list of communicable diseases.

On page 134, replace the paragraph preceding the bulleted list with the following:

MCL 333.5129(4) provides that upon conviction of a defendant or adjudication of a juvenile for a violation of any of the following offenses, the court having jurisdiction of the criminal prosecution or juvenile adjudication must order the defendant or juvenile to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection* and for the presence of HIV or an antibody to HIV.

*Effective May 13, 2004, 2004 PA 98 added hepatitis C infection to the list of communicable diseases.

CHAPTER 8

The Crime Victim at Trial

8.11 Admissible Hearsay Statements by Crime Victims

C. Statements of Existing Mental, Emotional, or Physical Condition

Insert the following case summary on page 186, immediately before subsection (D):

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at ___.

June 2004

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.25 Communicable Disease Testing and Examination

Replace the introductory paragraph on page 37 with the following language:

Under MCL 333.5129(3), a criminal defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, and hepatitis C infection* and for the presence of HIV or an antibody to HIV if the court determines there is reason to believe the violation involved sexual penetration or exposure to the defendant's body fluid:

*Effective May 13, 2004, 2004 PA 98 added hepatitis C infection to this list of conditions.

Add "hepatitis C infection" to the list of conditions in the second sentence of the first full paragraph on page 38.

June 2004

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

Insert the following case summary on page 74 after the first paragraph of the discussion section:

Where a defendant's nonresponsive conduct or silence is not attributable to the defendant's invocation of his Fifth Amendment or *Miranda* rights, the defendant's nonresponsive conduct may properly be admitted at trial as substantive evidence of the defendant's consciousness of guilt. *People v Solmonson*, ___ Mich App ___, ___ (2004). In *Solmonson*, the police found the defendant unconscious in the driver's seat of a vehicle parked on the side of the road. *Solmonson, supra* at ___. Testimony at trial established that the keys were in the car's ignition, the car's engine was still warm, and the defendant did not deny being the car's driver. *Solmonson, supra* at ___.

The defendant objected to the admission into evidence of statements he made at the scene and to the prosecutor's argument that the defendant's failure to deny being the driver of the vehicle was a tacit admission of guilt. *Solmonson, supra* at ___. The Court of Appeals concluded that the defendant's failure to deny being the driver was not a tacit admission of guilt because the defendant's silence did not follow an assertion in "which the [defendant] manifested an adoption or belief in its truth." MRE 801(d)(2)(B); *Solmonson, supra* at ___. Rather, the statements the defendant made during the police officer's administration of field sobriety tests—"This is bullshit" and "Just take me to jail"—coupled with the defendant's failure to deny being the driver of the car, were properly admitted against the defendant at trial as evidence of the defendant's awareness that his conduct was unlawful. *Solmonson, supra* at ___.

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

2. Searches Incident to Valid Arrest

Insert the following case summary near the middle of page 90 after the first paragraph of subsection (2):

**New York v Belton*, 453 US 454 (1981).

A police officer may lawfully search an individual's vehicle incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle. *Thornton v United States*, 541 US ___, ___ (2004). In *Thornton*, the defendant contested the admissibility of evidence obtained from the officer's search of his car when the officer who arrested the defendant did not address him until he was already out of, and away from, his vehicle. *Thornton, supra* at ___. The United States Supreme Court disagreed with the defendant's argument that a search incident to arrest under *Belton** "was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car." *Thornton, supra* at ___. According to the Court:

> "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested. . . . . The stress [and the risk of danger to the police officer] is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation [internal citations omitted]." *Thornton, supra* at ___.

The Court further reasoned:

> "*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants.' Indeed, the respondent in *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him [internal citations and footnote omitted]." *Thornton, supra* at ___.

June 2004

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.12 Constitutional Questions Under the Criminal Stalking Statutes

A. Double Jeopardy

1. Successive Prosecution

On page 93, immediately before the subsection entitled "**Multiple Punishments**," insert the following note:

> **Note:** *People v White,* 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*, 469 Mich at 578. See Section 8.12(C) for further discussion.

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.7 "Catch-All" Hearsay Exceptions

Insert the following case summary on page 188 before the summary of *People v Lee*, 243 Mich App 163 (2000):

- *People v Geno,* ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant's girlfriend's two-year-old daughter. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child's pull-up. The interviewer asked the child if she "had an owie," and the child answered, "yes, Dale [defendant] hurts me here" and pointed to her vaginal area. The defendant argued that the child's statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child's statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt,* 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant's right to confrontation was violated by the admission of the victim's statements. The Court of Appeals stated:

> "We recognize that with respect to 'testimonial evidence,' *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness's statement – despite the defendant's inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a 'firmly rooted hearsay exception' or it bears 'particularized guarantees of trustworthiness.' *Roberts, supra* at 66. However, we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .
>
> Therefore, we conclude, at least with respect to nontestimonial evidence such as the child's statement in this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim."

CHAPTER 8
Enforcing Personal Protection Orders

8.12 Double Jeopardy and Contempt Proceedings

C. The "Same Offense" — Michigan and Federal Principles

On page 376, delete the second sentence and related citations in the first bulleted item.

1. Michigan's Protection Against Successive Prosecution

Delete the existing text of this subsection and insert the following text:

People v White, 390 Mich 245 (1973) was overruled by the Michigan Supreme Court in *People v Nutt*, 469 Mich 565, 568 (2004). The Michigan Supreme Court readopted the "same-elements" test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich at 568. The "same transaction" test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra*, 469 Mich at 578. Until the *White* decision in 1973, Michigan courts had interpreted the prohibition against double jeopardy as precluding multiple prosecutions of a defendant for crimes involving identical elements. *Nutt, supra*, 469 Mich at 575.

In *Nutt*, the defendant pleaded guilty in a Lapeer County Court of one count of second-degree home invasion. *Nutt, supra*, 469 Mich at 569. Later, the defendant was bound over for trial in Oakland County on the charge of receiving and concealing a stolen firearm—the firearm was obtained in the defendant's admitted participation in the Lapeer County theft. *Nutt, supra*, 469 Mich at 570. The defendant moved to dismiss the receiving and concealing charge because *White* required the state "to join at one trial all charges arising from a continuous time sequence that demonstrated a single intent and goal." *Nutt, supra*, 469 Mich at 570.

The Michigan Supreme Court concluded that it had incorrectly construed the meaning of the constitutional phrase "same offense" in its *White* decision because the ratifiers of the 1963 Constitution intended that "same offense" be accorded the meaning given its federal counterpart and that it be interpreted consistently with "state and federal double jeopardy jurisprudence as it then existed." *Nutt, supra*, 469 Mich at 575. The Court stated that the *White* Court "strayed from [the ratifiers'] intent when it adopted the same transaction test" and explained that the remedy for that error required a "return to the same-elements test, which had been consistently applied in this state until its abrogation . . . in 1973 [footnote omitted]." *Nutt, supra*, 469 Mich at 575.

Michigan's return to the same-elements test signifies a return to "the well-established method of defining the Fifth Amendment term 'same offence'" known as the *Blockburger* test. *Nutt, supra*, 469 Mich at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt, supra*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

The same-elements test, as dictated directly by the *Blockburger* Court, provides:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra*, 284 US at 304; *Nutt, supra*, 469 Mich at 577-578.

As applied to the *Nutt* case, the Court determined that the defendant could properly be tried for the receiving and concealing charge even though she pleaded guilty to the offense from which the stolen property was obtained. *Nutt, supra*, 469 Mich at 593. Because the elements required to convict her for each offense were not identical, the defendant's protection from double jeopardy was not violated. *Nutt, supra*, 469 Mich at 593. Specifically, the defendant's conviction for second-degree home invasion required proof that (1) the defendant entered a dwelling by breaking or entered without permission, and (2) the defendant entered with the intent to commit a felony or larceny in the dwelling. *Nutt, supra*, 469 Mich at 593. The defendant's conviction for receiving and concealing a stolen firearm required proof that (1) the defendant received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan, (2) a stolen firearm or stolen ammunition, and (3) the defendant knew that the firearm or ammunition was stolen. *Nutt, supra*, 469 Mich at 593. The Court explained:

> "Clearly, there is no identity of elements between these two offenses. Each offense requires proof of elements that the other does not. Because the two offenses are nowise the same offense under either the Fifth Amendment or art 1, § 15, we affirm the result reached by the Court of Appeals majority and hold that defendant is not entitled to the dismissal of the Oakland County charge." *Nutt, supra*, 469 Mich at 593.

8.12 Double Jeopardy and Contempt Proceedings

C. The "Same Offense" — Michigan and Federal Principles

3. *United States v Dixon* — the "Same Offense" in Federal Courts

On page 380, delete the contents of the "**Note**" in the middle of the page and insert the following text:

> **Note:** In *People v Nutt*, 469 Mich 565, 568 (2004), the Michigan Supreme Court readopted the *Blockburger* test, also known as the "same-elements" test, to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction.

CHAPTER 12

Domestic Violence and Access to Children

12.2 Determining a Child's Best Interests in Custody Cases Involving Allegations of Domestic Violence

B. Principles for Weighing the Best Interest Factors

On the bottom of page 491, insert the following text:

When weighing the best interest factors, the court may also interview the child to determine if the child has a preference regarding custody. MCR 3.210(C)(5)* states:

> "(5) The court may interview the child privately to determine if the child is of sufficient age to express a preference regarding custody, and, if so, the reasonable preference of the child. The court shall focus the interview on these determinations, and the information received shall be applied only to the reasonable preference factor."

*Effective May 1, 2004. Administrative Order 2002-13.

June 2004

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.8 Evaluating a Juvenile's Competence

Please delete the first paragraph of the May 2004 update to page 164 that indicates that *In re Blackshear* is an unpublished opinion and is therefore not binding under the rule of stare decisis. On May 18, 2004, *Blackshear* was approved for publication. *In re Blackshear,* ___ Mich App ___ (2004).

CHAPTER 10

Juvenile Dispositions

10.9 Dispositional Options Available to Court

K. State Minimum Costs

Effective May 13, 2004, 2004 PA 102 amended MCL 712A.18m to require a court to order minimum state costs only if the court also orders the juvenile to pay other fines, costs, restitution, assessments or other payments. In the October 2003 update to page 226, replace the quoted paragraph (1) with the following quote:

> "(1) If a juvenile is within the court's jurisdiction under section 2(a)(1) of this chapter, and is ordered to pay any combination of fines, costs, restitution, assessments, or payments arising out of the same juvenile proceeding, the court shall order the juvenile to pay costs of not less than the following amount, as applicable:"

10.9 Dispositional Options Available to Court

K. State Minimum Costs

In the October 2003 update to page 228, insert the following text following the quotation of MCL 771.3(7)(a)-(b):

A juvenile who has been ordered to pay state minimum costs* as a condition of probation or supervision and who is not in willful default of the payment may petition the court at any time for a remission of the payment of any unpaid portion of the state minimum costs. MCL 712A.18(19). The court may remit all or part of the amount of the state minimum cost due or modify the method of payment if the court determines that payment of the amount due will impose a "manifest hardship on the juvenile or his or her immediate family." *Id*.

*State minimum costs ordered pursuant to MCL 712A.18m. See the October 2003 update for more information on state minimum costs.

CHAPTER 25

Recordkeeping & Reporting Requirements

25.20 Required Communicable Disease Testing

A. Mandatory Testing or Examination of Juveniles Bound Over for Trial in the Criminal Division

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 to require testing for hepatitis C infection. On page 549, replace the first paragraph with the following text:

If a defendant is bound over to the Criminal Division for a violation of any of several enumerated offenses, and if the district court determines there is reason to believe the violation involved sexual penetration or exposure to the body fluid of the defendant, the district court must order the defendant to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, and for the presence of HIV or an HIV antibody. MCL 333.5129(3).

B. Mandatory Testing or Examination Following Juvenile Adjudication or Conviction

On page 550, replace the first paragraph in this subsection with the following text:

MCL 333.5129(4) states that upon conviction of a defendant or the issuance by the Family Division of an order adjudicating a child to be within the provisions of MCL 712A.2(a)(1) for a violation of any of the following offenses, the court having jurisdiction of the criminal prosecution or juvenile hearing must order the defendant or child to be examined or tested for venereal disease, hepatitis B infection, and hepatitis C infection, and for the presence of HIV or an HIV antibody.

25.20 Required Communicable Disease Testing

E. Ordering Payment of the Costs of Examination and Testing

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 to allow a court to order a juvenile to pay the costs of communicable disease testing. On page 552, insert the following new subsection:

Upon conviction or juvenile adjudication, the court may order an individual who is examined or tested under MCL 333.5129 to "pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) states:

> "An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

June 2004

Update: Juvenile Traffic Benchbook

CHAPTER 5

Dispositional Hearings

5.5 Dispositional Options

K. State Minimum Costs

Insert the following language to the October 2003 update to page 5-6:

Effective May 13, 2004, 2004 PA 102 amended MCL 712A.18m(1) to condition the court's order of state minimum costs on whether the juvenile "is ordered to pay any combination of fines, costs, restitution, assessments, or payments arising out of the same juvenile proceeding." As amended, MCL 712A.18m(1) requires the court to order a juvenile to pay state minimum costs only if the court orders that other payments be made based on the court's disposition of the matter.

Also effective May 13, 2004, 2004 PA 102 added a provision to MCL 712A.18 allowing a juvenile to petition the court for remission or modification of the court's order to pay state minimum costs. As amended, MCL 712A.18 provides:

> "(19) A juvenile who has been ordered to pay the minimum state cost as provided in section 18m of this chapter as a condition of probation or supervision and who is not in willful default of the payment of the minimum state cost may petition the court at any time for a remission of the payment of any unpaid portion of the minimum state cost. If the court determines that payment of the amount due will impose a manifest hardship on the juvenile or his or her immediate family, the court may remit all or part of the amount of the minimum state cost due or modify the method of payment."

June 2004

Update: Sexual Assault Benchbook

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

A. Defendants Arrested and Charged

1. Discretionary Examination and Testing

Replace the last paragraph on page 311 (preceding the bulleted list) with the following text:

Under MCL 333.5129(1), a defendant who is arrested and charged with a violation of any of the following prostitution offenses may, upon order of the court, be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

*SCAO Form MC 234.

Replace the first full paragraph on page 312 with the following text:

If the examination or test results indicate the presence of venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department of community health, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

2. Mandatory Distribution of Venereal Disease and HIV Information and Recommendation of Counseling

Near the top of page 313, replace the cross-reference to the sixth bullet with the following text:

*A person charged with or convicted of this crime, or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not venereal disease. MCL 333.5129(9).

On the middle of page 313, replace the first sentence of last paragraph before subsection (B) with the following text:

Additionally, the judge or magistrate must *recommend* that the defendant obtain additional information and counseling at a local health department testing and counseling center regarding venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. MCL 333.5129(2).

B. Defendants Bound Over to Circuit Court

1. Mandatory Examination and Testing

Near the bottom of page 313, replace the first paragraph in this subsection with the following text:

*SCAO Form 234.

Under MCL 333.5129(3), a defendant who is bound over to circuit court for a violation of any of the following offenses must be ordered by the district court to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV, and HIV antibodies, provided there is reason to believe the alleged violation involved sexual penetration or exposure to a body fluid of the defendant:*

6.13 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

E. Positive Test Results Require Referral for Appropriate Medical Care

On page 316, replace the first sentence of the first paragraph in this subsection with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV, must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

F. Ordering Payment of the Costs of Examination and Testing

On page 316 after subsection (E) insert the following new subsection:

Upon conviction or juvenile adjudication the court may order an individual who is examined or tested under MCL 333.5129 to "pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) states:

> "An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

D. Statements of Existing Mental, Emotional, or Physical Condition—MRE 803(3)

Near the top of page 346 before the first full paragraph, insert the following text:

A declarant's out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he "had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun." *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses' testimony about the victim's out-of-court statements because the statements went beyond MRE 803(3)'s exception for statements concerning a declarant's "then existing mental, emotional, or physical condition." *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant's* past or presumed future actions rather than describing the *declarant-victim's* intentions or plans. *Moorer, supra* at ___.

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

H. "Catch-All" Hearsay Exceptions—MRE 803(24) and MRE 804(b)(7)

On page 358, before the summary of *People v Lee*, insert the following case summary:

♦ *People v Geno,* ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant's girlfriend's two-year-old daughter. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the childs's pull-up. The interviewer asked the child if she "had an owie," and the child answered, "yes, Dale [defendant] hurts me here" and pointed to her vaginal area. The defendant argued that the child's statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child's statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt,* 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant's right to confrontation was violated by the admission of the victim's statements. The Court of Appeals stated:

> "We recognize that with respect to 'testimonial evidence,' *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness's statement – despite the defendant's inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a 'firmly rooted hearsay exception' or it bears 'particularized guarantees of trustworthiness.' *Roberts, supra* at 66. However, we conclude that the child's statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .
>
> "[A]t least with respect to nontestimonial evidence such as the child's statement in this case, . . . the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-

determinative error with respect to his Confrontation Clause claim."

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

On page 364, after the April 2004 update, insert the following text:

The Michigan Court of Appeals in *People v Geno,* ___ Mich App ___, ___ (2004), held that a child-victim's statement to an interviewer at a children's assessment center does not constitute testimonial evidence under *Crawford v Washington,* 541 US ___ (2004), and therefore is not barred by the Confrontation Clause.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.2 Post-Conviction Bail

A. Before Sentencing

On page 442, insert the following text as a new subsection 2 and renumber the remaining subsection appropriately:

2. Convictions For Sexual Assault of a Minor

*See 2004 PA 32.

Effective June 30, 2004,* if a defendant is convicted of sexual assault of a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor refers to an individual who is less than 16 years of age. MCL 770.9b(3)(a). "Sexual assault of a minor" means a violation of any of the following involving an individual who is less than 16 years of age:

- First-degree criminal sexual conduct, MCL 750.520b. MCL 770.9b(3)(b)(*i*).
- Second-degree criminal sexual conduct, MCL 750.520c. MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving force or coercion used to accomplish penetration, MCL 750.520d(1)(b). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving penetration of a victim who is related to the defendant by blood or affinity to the third degree, MCL 750.520d(1)(d). MCL 770.9b(3)(b)(*i*).
- Third-degree criminal sexual conduct involving a victim who is between the ages of 16 and 18 and a student at a public or nonpublic school and the defendant is a teacher, substitute teacher, or administrator of that public or nonpublic school, MCL 750.520d(1)(e). MCL 770.9b(3)(b)(*i*).

  Note: MCL 770.9b(3)(b)(*i*) contradicts itself. In order for the defendant to be convicted of MCL 750.520d(1)(e), the victim must be at least 16 years of age but less than 18 years of age. However, pursuant to MCL 770.9b, "sexual assault of a minor" requires that the victim be less than 16 years of age.

- Third-degree criminal sexual conduct involving penetration of a victim who is at least 13 years old but under the age of 16, MCL 750.520d(1)(a), if the defendant is five or more years older than the victim. MCL 770.9b(3)(b)(*ii*).

- Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9b(3)(b)(*iii*).

B. After Sentencing and Pending Appeal

On page 443, insert the following text as a new subsection 2 and renumber the current subsection 2:

2. Convictions For "Sexual Assault of a Minor"

If a defendant has been convicted and sentenced for committing a sexual assault against a minor and files an appeal or application to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See Section 9.2(A)(2), above, for the definition of "sexual assault of a minor."

CHAPTER 9

Post-Conviction and Sentencing Matters

9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

Effective May 13, 2004, 2004 PA 98 amended MCL 333.5129 governing testing for venereal disease, hepatitis, and HIV.

A. Mandatory Testing and Counseling

On page 446, replace the first paragraph with the following text:

*SCAO Form MC 234.

Under MCL 333.5129(4), a defendant who is convicted of, or a juvenile who is found responsible for, violating any of the following offenses must be ordered by the court with jurisdiction over the criminal prosecution or juvenile hearing to be examined or tested for venereal disease, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:*

9.3 Testing and Counseling for Venereal Disease, Hepatitis, and HIV

D. Positive Test Results Require Referral for Appropriate Medical Care

On page 448, replace the first sentence in this section with the following text:

A person counseled, examined, or tested under MCL 333.5129 and found to be infected with a venereal disease, hepatitis B, hepatitis C, or HIV must be referred by the agency providing the counseling or testing for appropriate medical care. MCL 333.5129(8).

E. Ordering Payment of the Costs of Examination and Testing

On page 448 after subsection (D) insert the following new subsection:

Upon conviction or juvenile adjudiction, the court may order an individual who is examined or tested under MCL 333.5129 to "pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) states:

> "An individual who is ordered to pay the costs of an examination or test under [MCL 333.5129(10)] shall pay those costs within 30 days after the order is issued or as otherwise provided by the court. The amount ordered to be paid under [MCL 333.5129(10)] shall be paid to the clerk of the court, who shall transmit the appropriate amount to the physician or local health department named in the order. If an individual is ordered to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments shall be allocated as provided under the probate code of 1939, 1939 PA 288, MCL 710.21 to 712A.32, the code of criminal procedure, 1927 PA 175, MCL 760.1 to 777.69, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834. An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

E. Probation

5. Contents of Probation Orders

Effective May 26, 2004, 2004 PA 116 amended MCL 771.3 to allow the court to impose an additional condition on probationers. Near the middle of page 461, add the following bullet to the end of the bulleted list:

- Complete his or her high school education or obtain the equivalency of a high school education in the form of a general education development (GED) certificate. MCL 771.3(2)(q).

June 2004

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.2 Police Authority to Arrest Without a Warrant

E. Defendant Rights at Arrest

2. Sixth Amendment Right to Counsel

Add the following language to the July 2003 update to page 2-9:

The Michigan Supreme Court vacated the Court of Appeals decision discussed above and remanded the matter for the Court's consideration of the defendant's remaining claim. *People v Fett*, 469 Mich 907 (2003). On remand, the Court of Appeals concluded that the defendant's remaining claim* did not merit reversal and affirmed her conviction. *People v Fett (On Remand)*, ___ Mich App ___ (2004).

*The defendant challenged the propriety of admitting certain evidence during cross-examination of the defendant's expert witness.